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Nos. 403, 404

In the Supreme Court of the United States

OCTOBER TERM, 1935

GEORGE ASHWANDER ET AL., PETITIONERS

v.

TENNESSEE VALLEY AUTHORITY ET AL.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR RESPONDENT TENNESSEE VALLEY AUTHORITY

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In the Supreme Court of the United States

OCTOBER TERM, 1935

Nos. 403, 404

GEORGE ASHWANDER ET AL., PETITIONERS

v.

TENNESSEE VALLEY AUTHORITY ET AL.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR RESPONDENT TENNESSEE VALLEY AUTHORITY

OPINIONS BELOW

The opinion of the District Court (R. 376) is reported in 9 F. Supp. 965, and its opinion on a preliminary motion to dismiss (R. 289) in 8 F. Supp. 893. The opinion of the Circuit Court of Appeals (R. 1302) has not yet been officially reported.

JURISDICTION

The judgment sought to be reviewed was entered July 17, 1935. (R. 1311). The petition for writs of certiorari was filed August 28, 1935. Petitioners

invoke the jurisdiction of this Court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

In No. 403

1. Whether, in the absence of fraud, duress, negligence, or inadequacy of consideration, minority stockholders may sue to annul a contract of their corporation for the sale of properties to the Tennessee Valley Authority upon the ground that the contract is beyond the constitutional powers of the Authority.

2. Whether the Federal Government may dispose of the surplus water power necessarily created by Wilson Dam and may authorize generation of electric energy and acquisition of transmission lines as a means of facilitating this disposal.

In No. 404

Whether, in the circumstances of this case, the Circuit Court of Appeals committed reversible error in sustaining the refusal of the District Court to grant a declaratory decree.

STATUTES INVOLVED

The relevant provisions of the Tennessee Valley Authority Act are set forth in the Appendix, *infra*, pp. 20–27.

STATEMENT

The contract in issue was made between the Alabama Power Company and the Tennessee Valley Authority on January 4, 1934.[1] In minor respects it was amended and supplemented on February 13, 1934, and May 24, 1934 (R. 154; 512). The contract, after recitals of mutual benefit, contained the following material provisions (R. 133–151):

> (1) An agreement by the Alabama Power Company to sell to the Authority certain transmission lines extending from Wilson Dam to the surrounding territory in northwestern Alabama, together with certain real property in the area known as the Joe Wheeler Dam Site, such properties to be delivered to the Authority, upon its request, for a purchase price of $1,150,000;
>
> (2) An agreement between Alabama Power Company and the Authority for the interchange of electric power pursuant to a schedule of rates, settlement to be made quarterly; and
>
> (3) An agreement between the two parties for a territorial division of their services.

[1] The contract was one of a group made concurrently by the Tennessee Valley Authority with the Commonwealth & Southern Corporation and four of its subsidiaries, the Alabama Power Company, the Tennessee Electric Power Company, the Mississippi Power Company, and the Georgia Power Company. The other contracts of the group, although contained in the same general document, were considered as independent in both courts below and are not involved in this suit.

The interchange and territorial provisions were to terminate December 31, 1938, or three months after the completion of the Norris Dam power plant, whichever should be earlier. The interchange agreement has been continuously performed to the present time. (R. 961.)

On September 13, 1934, this suit was brought in the Circuit Court for the Eighth Judicial Circuit of Alabama by fourteen preferred stockholders of the Alabama Power Company, holding approximately 1,800 of the 367,207 preferred shares, against the Power Company, the Tennessee Valley Authority, its three directors individually, the Electric Home and Farm Authority, Inc., the Chemical Bank and Trust Company and the Guaranty Trust Company of New York, as trustees, respectively, under existing mortgages of the Power Company, and eighteen municipalities of Alabama. (R. 1–3, 10). The suit was removed to the District Court for Northern Alabama on petition of the Authority. (R. 217.) The bill of complaint, which occupies without exhibits 99 pages of the record, alleged that the contract of January 4 was induced by duress (R. 4, 15, 36, 46, 53), that the consideration for the properties to be transferred by the Power Company was inadequate (R. 43, 85), that the Authority was threatening to engage in illegal and destructive competition with the Power Company (R. 4, 34–35), that the Tennessee Valley Authority Act was, in the applicable respects, unconstitutional (R. 30, 31),

and that the directors and stockholders of the Power Company had refused upon demand to bring suit to annul the contract and to enjoin the Authority from the activities complained of (R. 86–88).[2] The bill prayed, in twenty-seven numbered paragraphs, that the contract in question be annulled; that the Power Company and the mortgage trustees be enjoined from transferring the properties pursuant to the contract; that the defendant municipalities be enjoined from entering into or executing any agreement with the Authority for the purchase of electricity for distribution at schedules prescribed by or subject to the control of the Authority; that any properties acquired by the defendants from the Power Company pending final decree be restored; and that "the plan and program of the * * * Authority for the sale or distribution of energy created at Wilson Dam or at any other federal project in the Tennessee Basin at rates for sale or resale to the general public stipulated, fixed or controlled by the * * * Authority," be declared beyond the lawful power of the Federal Government. (R. 90–98.)

[2] The bill of complaint made numerous references to an option contract of August 9, 1934, between the Alabama Power Company and the Tennessee Valley Authority for the purchase by the latter of certain urban distribution systems. This contract was appropriately terminated before the final hearing in this case. (Fdg. 12, R. 1037.) Consequently, it was not before the District Court on final hearing, was not in issue before the Circuit Court of Appeals, and is not in issue on this petition.

The bill of complaint was attacked in the District Court, by appropriate motion, for prolixity, multifariousness, and misjoinder, as well as for want of equity, and on the ground that the plaintiffs were not entitled to maintain this suit. (R. 271, 273.) The District Court, although denying the motions, rendered an opinion (R. 289) in effect limiting the issues of the case to the validity of the contract of January 4, 1934, between Alabama Power Company and the Authority. Referring to this ruling, the District Judge said (R. 377).:

> I told counsel that, while the bill contained many things, the only one that I would regard would be the validity of the contract or transaction between the Alabama Power Company, which the preferred stockholders are assailing, and the Tennessee Valley Authority. That is to say, the contract conveying the transmission lines, and making certain arrangements about the interchange of power.

The District Court further limited the issues by ruling that the bill did not make a showing of fraud, negligence, or duress in the making of the contract, stating (R. 289–290):

> There is no showing that the management of the Alabama Power Company were guilty of fraud, oppression, or gross negligence. They are shown to have acted in good faith and because they thought the transaction with the Tennessee Valley Authority was in the interest of the Alabama Power Com-

> pany. * * * It is not shown that the management of the Alabama Power Company, in the transaction with the Tennessee Valley Authority, acted under legal duress.

Answers were thereafter filed by several defendants, including this respondent, denying the material allegations of the bill. (R. 333.) Subsequently the plaintiffs filed an amended and supplemental bill of complaint, praying that a declaratory decree be given adjudging the statutory and constitutional power of the Authority to perform various enumerated activities; that the defendant municipalities be enjoined from entering into or performing any contract with the Public Works Administration or any other Federal agency for a loan or grant of funds for the construction or acquisition of an electric utility distribution system to be supplied with power transmitted by or sold for the account of the Tennessee Valley Authority; and that the Authority be enjoined from the sale of power, wherever generated, to be used or resold in competition with the Alabama Power Company. (R. 1283–1288.)

The case was heard on extensive testimony relating to the purposes and functions of Wilson Dam and the three other dams now under construction by the Authority, and to the nature of its so-called power policy. In accordance with the ruling of the District Court on the motion to dismiss, the court refused to try any question as to the adequacy of the consideration or as to the rates to be charged

for power generated by the Authority (no error being assigned as to these rulings).

At the close of the evidence the District Court rendered an oral opinion, holding that the Tennessee Valley Authority proposed to utilize the properties described in the contract for the purpose of marketing amounts of electric power in excess of that produced unavoidably in an effort to limit the production to that necessary for serving Government properties. (R. 376.) The court held that, in authorizing the sale of "surplus power", the Act must be construed to authorize the sale of only the surplus unavoidably produced in an effort to supply Government properties alone, and that, if construed otherwise, the provision would be unconstitutional. The decree of the District Court annulled and enjoined performance of the contract of January 4, 1934, between the Authority and the Power Company.[3] (R. 382.) The court declined, however, to grant any declaratory relief. Six weeks

[3] In addition, the decree enjoined the defendant municipalities from entering into or performing any contract with the Tennessee Valley Authority for the purchase of energy from it, and restrained the municipalities from accepting or expending any funds from the Tennessee Valley Authority or the Public Works Administration or any other agency of the United States, for the purpose of constructing a distribution system for electric power to be supplied by the Tennessee Valley Authority. The decree also annulled the contract of the Electric Home and Farm Authority, Inc., with the Alabama Power Company, dated May 21, 1934. These contracts were annulled because of their relation to the main contract of January 4, 1934.

later, findings of fact and conclusions of law were entered. (R. 1035.)

The Tennessee Valley Authority, its directors, the Electric Home and Farm Authority, Inc., and the City of Florence appealed from the decree. (R. 1183; 1173.) The plaintiffs filed a cross appeal, alleging as error the failure of the District Court to grant a declaratory decree. (R. 1293.) In the cross-appeal all the defendants to the bill of complaint were joined as cross-appellees.

The Circuit Court of Appeals reversed the decree of the District Court, except as to its refusal to grant a declaratory decree. The court held that the generation of electric energy at Wilson Dam, and its transmission over the only lines leading therefrom, were lawful means, under the Act and the Constitution, of disposing of the surplus water power necessarily created by Wilson Dam. (R. 1307.)

The continued idleness of the Muscle Shoals properties as a whole, and the annual waste of vast quantities of unused power at Wilson Dam, has been a vexatious legislative problem for many years. (R. 707–712.)

After various proposals had been made, from time to time, for the utilization of these properties, Congress enacted the Tennessee Valley Authority Act, the relevant provisions of which are printed in the Appendix. This Act, aproved May 18, 1933, conferred upon the Authority the power to control

and operate, for the purposes therein provided, the properties at Muscle Shoals, the chief of which are the Wilson Dam and hydroelectric power plant, a processing plant for the production of certain war materials, known as Nitrate Plant No. 2, and an auxiliary steam plant. (R. 708–712.)

The purposes of the Act are declared in Section 1 to be to maintain and oerate the Muscle Shoals property in the interests of national defense, to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River Basins. The Act directed a peace-time operation of the Muscle Shoals properties to maintain them for national defense purposes (Sections 5, 20); and authorized the Authority, in accordance with a stated policy (Sections 10, 11) to contract for the sale of surplus power generated by it and to purchase or construct transmission lines "in order to place the Board upon a fair basis for making such contracts and for receiving bids for the sale of such power" (Section 12).

The Muscle Shoals properties were constructed or acquired by the United States pursuant to Section 124 of the National Defense Act of 1916, and were complete by 1926, when construction was finished on the large hydro-electric dam on the Tennessee River, called Wilson Dam, which contained eight generators (Fdg. 38, R. 1046; fdg. 172, R. 1090). Wilson Dam, in addition to furnishing electric power for national-defense operations, im-

proved navigation over the Muscle Shoals rapids for a distance of some fifteen miles, and was the only feasible means of eliminating this most serious obstruction to navigation on the Tennessee River (Fdg. 131, R. 1082), which had been a matter of national concern for more than a century (R. 708). Until the enactment of the Tennessee Valley Authority Act these properties at Muscle Shoals remained idle, except for the operation of the dam for improvement of navigation on the Tennessee River and the generation of electric energy for governmental use and for sale in limited quantities to the Alabama Power Company (Fdgs. 172, 173; R. 1089–1090).

As an inevitable result of the impounding of waters of the Tennessee River by Wilson Dam and the natural flow of water over that dam there has been continuously created a vast quantity of unused power. The record shows for the years 1926 to 1933, inclusive, the available power at Wilson Dam, the amount sold to the Alabama Power Company and the available power not used (R. 957; Def. Ex. 97, R. 958). Throughout these years large quantities of the surplus have been wasted; in every year, except one, the amount of potential electric power so wasted has been far in excess of that used or sold. (Def. Ex. 97, R. 958.) The available surplus of this energy at Wilson Dam is more than sufficient to serve, independent of any other source of power, all of the territory surrounding the dam, which is now serviced by the transmission lines that

are the subject of the contract of January 4. (Fdg. 120, R. 1079). All the transmission lines in suit extend out from Wilson Dam and service this area. (Fdg. 121, R. 1080.) The Alabama Power Company, with its affiliates, owns all transmission lines serving the area within a radius of approximately one hundred miles of Wilson Dam. (Def. Ex. 98, R. 962; 1023.) In order to dispose of the power in this territory surrounding Wilson Dam, the acquisition of the transmission lines included in the contract of January 4, or substantially duplicating lines, would be necessary. (R. 960.)

ARGUMENT

I

We believe that the decision below is correct and that there are no decisions in conflict with it. The case is, however, one of obvious public importance. While we do not oppose the granting of the writ in No. 403, we respectfully submit the following statement for the purpose of aiding the Court in passing upon the petition.

1. The right of the plaintiffs to maintain this suit is questionable. This is apparently the only recorded case in the Federal courts in which minority stockholders have been permitted to bring suit for the purpose of annulling a contract of their corporation which is not assailable for fraud, duress, negligence of the directors, or inadequacy of consideration, and which is not *ultra vires* the corporation (Cf. *Dodge* v. *Woolsey,* 18 How. 331; *Hawes* v. *Oakland,* 104 U. S. 450, 460), but which

is attacked on the sole asserted ground that it is beyond the constitutional authority of the other contracting party.[4] The case of *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180, relied upon below by the petitioners, presented a situation where assets of the title company were about to be invested in executory obligations whose validity was questioned—a transaction threatening waste of the corporate assets. In the instant case, execution of the contract could result in loss to the corporation only in the event, suggested by the bill of complaint and the opinion of the District Court (R. 51, 291), that the Government may later seek to recover what it has paid on the ground that its own action was unconstitutional, a course of action which has never been pursued, which it is fanciful to imagine ever would be pursued, and the legality of which is doubtful. This is not a sufficient showing of damage to entitle petitioners to maintain this suit. Cf. *Frothingham* v. *Mellon*, 262 U. S. 447; *New Jersey* v. *Sargent*, 269 U. S. 328; *Arizona* v. *California*, 283 U. S. 423.

2. The questions presented on this application are neither so numerous nor so broad as intimated in the petition, nor is the right to dispose of surplus power a novel question. The action of Congress in this regard is consonant with the prevention of

[4] The only case which has been found on this point has denied the right of the stockholder to sue. *Hinds County et al.* v. *Natchez, J. & C. Ry. Co.*, 85 Miss. 599; 38 So. 189 (1905).

waste of natural resources embodied in the national policy of conservation originally established under President Theodore Roosevelt. The method of disposition now complained of has been the unquestioned practice of the Bureau of Reclamation in disposing of surplus power at government dams for many years. (R. 948–955.)

The sole substantive question in this case is whether the Congress may dispose of the power necessarily created by Wilson Dam, and authorize the acquisition of these transmission lines as a means of facilitating that disposal.[5] We do not understand the petitioners to question the legitimacy of the construction of the dam or of the installation of the generators, or the fact that the dam has continuously served legitimate federal

[5] Petitioners state that a further question is presented, namely, whether Congress can authorize a steam plant to be operated commercially (Petition, p. 14). Petitioners acknowledge that this question was not decided or discussed by the court below. The only evidence on this subject is that there is included among the Muscle Shoals properties a large steam electric plant, auxiliary to Wilson Dam, which has remained idle since its completion (R. 707), and that two small stand-by steam boilers were acquired in connection with the purchase from the Mississippi Power Company of certain transmission properties in Mississippi not included in the contract with the Alabama Power Company and not involved in this suit. The record shows that more than sufficient electric energy is available at Wilson Dam to continuously serve the lines purchased without any auxiliary source of power, steam or hydroelectric (Fdg. 120). There is no evidence that the use of these steam plants is proposed in connection with the transmission lines here involved.

functions. The petitioners challenge, however, the ownership of the Federal Government in the surplus water power necessarily made available by the dam, and the right of the Government to dispose of that surplus power. The suggestion of petitioners (Br. 17) that the right of disposition enjoyed by the Federal Government does not include all the power created by the dam but is limited to such power as is created by waters manipulated for navigation alone is a limitation nowhere suggested in the cases and obviously inconsistent with any real power of disposition. We believe that these issues have been settled by an unbroken series of decisions of this Court, culminating in *Arizona* v. *California*, 283 U. S. 423. See *Kaukauna Water Power Co.* v. *Green Bay & Mississippi Canal Co.*, 142 U. S. 254; *Green Bay & Mississippi Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58; *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53; also *Waters* v. *Phillips*, 284 Fed. 237 (C. C. A. 7th); *Buchanan* v. *United States*, 78 C. Cls. 791, certiorari denied, 294 U. S. 723. These cases are based upon recognition of the physical fact that navigation dams inevitably create power, and the economic fact that disposal of that power avoids waste and tends to produce revenues which aid in the reimbursement of the costs of navigation improvements.

The remaining question concerns the choice by Congress of the means of disposal of the surplus power. It is settled that water power necessarily created as a byproduct of a navigation dam is prop-

erty of the United States. *Green Bay & Mississippi Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, 80. The United States may dispose of its property in accordance with any policy it deems in the public interest. Constitution, Article IV, Sec. 3, Clause 2; *United States* v. *Gratiot,* 14 Pet. 526; *Ruddy* v. *Rossi,* 248 U. S. 104. It is a matter of common knowledge that the modern and customary method of disposing of water power is by generation and transmission to purchasers. "In fact," as was said in *Waters* v. *Phillips, supra,* at 239, "it would be the unusual and rare exception to find a large and expensive dam constructed and a large pondage created without an attending power plant to utilize the potential power of the passing water." The generation and marketing of electric energy had been employed by the Federal Government without question prior to the Tennessee Valley Authority Act. The Alabama Power Company itself purchased at Wilson Dam, in the years 1926 through 1933, approximately 98 percent of the electric power produced there by the United States. (Fdg. 172, R. 1089–1090.) In addition to the long-established practice of the Reclamation Bureau already referred to, (page 14, *supra*) the enactment of the Boulder Canyon Project Act of 1928 is significant. C. 42, 45 Stat. 1057, sustained in *Arizona* v. *California, supra.*

Under the conditions prevailing at Wilson Dam, generation and transmission are incidental to the maintenance of the dam and are the only feasible

means of "making marketable" (cf. *Hanson* v. *United States,* 167 Fed. 881, 883 (C. C. A. 9th)), the power there available. Recognizing that the Alabama Power Company is the sole available purchaser at the dam (*supra,* p. 12), Congress undertook in the Tennessee Valley Authority Act to avoid this monopolistic position by authorizing the acquisition or construction of transmission lines "in order to place the Board upon a fair basis for making such contracts and for receiving bids for the sale of such power * * *." (Section 12.) In these circumstances, we submit, the Federal Government was not only clothed with the power, but was "charged with the duty" (*United States* v. *Beebe,* 127 U. S. 338, 342) of adopting that means of disposal of its property which is now under attack.

There is no force in petitioners' contention that the generation, sale, and transmission of electric energy constitutes "proprietary business" commercial in character and, therefore, beyond the permissible functions of the Federal Government. The Constitution no more prohibits the Federal Government from engaging in a proprietary business than it forbids the creation of corporations to conduct a banking business; neither is an end in itself but each may be the means of reaching a legitimate end. Examples of governmental activities which in their commercial aspects are similar to that now challenged are numerous and familiar. Among these, in addition to the sales of electric energy already

referred to, are the establishment of banks (*McCulloch* v. *Maryland*, 4 Wheat. 316); the leasing of lead mines on the public lands with provision for sharing in the gross revenues (*United States* v. *Gratiot, supra*); the ownership and operation of merchant ships (*Sloan Shipyards* v. *United States*, 272 Fed. 132 (D. C. W. D. Wash.)); the establishment of a federal housing corporation (*New Brunswick* v. *United States*, 276 U. S. 547); the establishment of the parcel post in competition with private express companies (37 Stat. 567); and the postal savings system in competition with banks (36 Stat. 815).

II

In No. 404 we oppose the granting of the writ. The petition presents a demand for a declaratory judgment which was refused by both the trial court and the Circuit Court of Appeals. Both courts below limited the case to the transaction before them involving the question of the right to dispose of the surplus power from Wilson Dam. Petitioners have repeatedly attempted to broaden the issues to include an attack on the future activities or possible programs of the Authority. As minority stockholders of the Alabama Power Company, they had no standing to attack such activities or programs, and their contention in this regard did not present a case or controversy within the cognizance of the Federal courts. The District Court, having already undertaken to place a proper limitation upon the

scope of the bill of complaint, refused to broaden and confuse the issues further and declined to enter a declaratory judgment. The Circuit Court of Appeals affirmed this action.

The Authority's presently proposed activities in the territory of the Alabama Power Company are limited by the terms of the contract before this Court. No declaratory decree is needed to pass upon such activities. And if the contract is a constitutional exercise of power, these petitioners have no standing to complain of the results thereof. Cf. *Puget Sound Power Co.* v. *City of Seattle,* 291 U. S. 619.

We submit that under the Declaratory Judgment Act (June 14, 1934, c. 512, 48 Stat. 955) refusal to grant the additional relief was a proper exercise of discretion, and, indeed, that in all of the circumstances the granting of the relief would have been an abuse of discretion.

Respectfully submitted.

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SEPTEMBER 1935.

APPENDIX

THE TENNESSEE VALLEY AUTHORITY ACT OF 1933 (C. 32, 48 STAT. 58, AND AS AMENDED BY ACT OF AUGUST 31, 1935, PUBLIC NO. 412, 74TH CONGRESS)

AN ACT

To improve the navigability and to provide for the flood control of the Tennessee River; to provide for reforestation and the proper use of marginal lands in the Tennessee Valley; to provide for the agricultural and industrial development of said valley; to provide for the national defense by the creation of a corporation for the operation of Government properties at and near Muscle Shoals in the State of Alabama, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of maintaining and operating the properties now owned by the United States in the vicinity of Muscle Shoals, Alabama, in the interest of the national defense and for agricultural and industrial development, and to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River Basins, there is hereby created a body corporate by the name of the "Tennessee Valley Authority" (hereinafter referred to as the "Corporation"). The board of directors first appointed shall be deemed the incorporators, and the incorporation shall be held to have

been effected from the date of the first meeting of the board. This Act may be cited as the "Tennessee Valley Authority Act of 1933."

* * * * *

SEC. 4. Except as otherwise specifically provided in this Act, the Corporation—

(j) Shall have power to construct such dams, and reservoirs, in the Tennessee River and its tributaries, as in conjunction with Wilson Dam, and Norris, Wheeler, and Pickwick Landing Dams, now under construction, will provide a nine-foot channel in the said river and maintain a water supply for the same, from Knoxville to its mouth, and will best serve to promote navigation on the Tennessee River and its tributaries and control destructive flood waters in the Tennessee and Mississippi River drainage basins; and shall have power to acquire or construct power houses, power structures, transmission lines, navigation projects, and incidental works in the Tennessee River and its tributaries, and to unite the various power installations into one or more systems by transmission lines. The directors of the Authority are hereby directed to report to Congress their recommendations not later than April 1, 1936, for the unified development of the Tennessee River system. (As amended by Act of Aug. 31, 1935.)

* * * * *

SEC. 7. In order to enable the Corporation to exercise the powers and duties vested in it by this Act—

(a) The exclusive use, possession, and control of the United States nitrate plants numbered 1 and 2, including steam plants, located, respectively, at Sheffield, Alabama, and Muscle Shoals, Alabama,

together with all real estate and buildings connected therewith, all tools and machinery, equipment, accessories, and materials belonging thereto, and all laboratories and plants used as auxiliaries thereto; and fixed-nitrogen research laboratory, the Waco limestone quarry, in Alabama, and Dam Numbered 2, located at Muscle Shoals, its power house, and all hydroelectric and operating appurtenances (except the locks), and all machinery, lands, and buildings in connection therewith, and all appurtenances thereof, and all other property to be acquired by the Corporation in its own name or in the name of the United States of America, are hereby intrusted to the Corporation for the purposes of this Act.

* * * * *

SEC. 9a. The Board is hereby directed in the operation of any dam or reservoir in its possession and control to regulate the stream flow primarily for the purposes of promoting navigation and controlling floods. So far as may be consistent with such purposes, the Board is authorized to provide and operate facilities for the generation of electric energy at any such dam for the use of the Corporation and for the use of the United States or any agency thereof, and the Board is further authorized, whenever an opportunity is afforded, to provide and operate facilities for the generation of electric energy in order to avoid the waste of water power, to transmit and market such power as in this act provided, and thereby, so far as may be practicable, to assist in liquidating the cost or aid in the maintenance of the projects of the Authority. (Added by Act of Aug. 31, 1935.)

* * * * *

SEC. 10. The board is hereby empowered and authorized to sell the surplus power not used in its operations, and for operation of locks and other works generated by it, to States, counties, municipalities, corporations, partnerships, or individuals, according to the policies hereinafter set forth; and to carry out said authority, the board is authorized to enter into contracts for such sale for a term not exceeding twenty years, and in the sale of such current by the board it shall give preference to States, counties, municipalities, and cooperative organizations of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members: *Provided,* That all contracts made with private companies or individuals for the sale of power, which power is to be resold for a profit, shall contain a provision authorizing the board to cancel said contract upon five years' notice in writing, if the board needs said power to supply the demands of States, counties, or municipalities. In order to promote and encourage the fullest possible use of electric light and power on farms within reasonable distance of any of its transmission lines the board in its discretion shall have power to construct transmission lines to farms and small villages that are not otherwise supplied with electricity at reasonable rates, and to make such rules and regulations governing such sale and distribution of such electric power as in its judgment may be just and equitable: *Provided further,* That the board is hereby authorized and directed to make studies, experiments, and determinations to promote the wider and better use of electric power for agricultural and domestic use, or for small or local indus-

tries, and it may cooperate with State governments, or their subdivisions or agencies, with educational or research institutions, and with cooperatives or other organizations, in the application of electric power to the fuller and better balanced development of the resources of the region.

SEC. 11. It is hereby declared to be the policy of the Government so far as practical to distribute and sell the surplus power generated at Muscle Shoals equitably among the States, counties, and municipalities within transmission distance. This policy is further declared to be that the projects herein provided for shall be considered primarily as for the benefit of the people of the section as a whole and particularly the domestic and rural consumers to whom the power can economically be made available, and accordingly that sale to and use by industry shall be a secondary purpose, to be utilized principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates and in such manner as to encourage increased domestic and rural use of electricity. It is further hereby declared to be the policy of the Government to utilize the Muscle Shoals properties so far as may be necessary to improve, increase, and cheapen the production of fertilizer and fertilizer ingredients by carrying out the provisions of this Act.

SEC. 12. In order to place the board upon a fair basis for making such contracts and for receiving bids for the sale of such power, it is hereby expressly authorized, either from appropriations made by Congress or from funds secured from the sale of such power, or from funds secured by the sale of bonds hereafter provided for, to construct,

lease, purchase, or authorize the construction of transmission lines within transmission distance from the place where generated, and to interconnect with other systems. The board is also authorized to lease to any person, persons, or corporation the use of any transmission line owned by the Government and operated by the board, but no such lease shall be made that in any way interferes with the use of such transmission line by the board: *Provided,* That if any State, county, or municipality, or other public or cooperative organization of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members, or any two or more of such municipalities or organizations, shall construct or agree to construct and maintain a properly designed and built transmission line to the Government reservation upon which is located a Government generating plant, or to a main transmission line owned by the Government or leased by the board and under the control of the board, the board is hereby authorized and directed to contract with such State, county, municipality, or other organization, or two or more of them, for the sale of electricity for a term not exceeding thirty years; and in any such case the board shall give to such State, county, municipality, or other organization ample time to fully comply with any local law now in existence or hereafter enacted providing for the necessary legal authority for such State, county, municipality, or other organization to contract with the board for such power: *Provided further,* That all contracts entered into between the Corporation and any municipality or other political subdivision or cooperative organiza-

tion shall provide that the electric power shall be sold and distributed to the ultimate consumer without discrimination as between consumers of the same class, and such contract shall be voidable at the election of the board if a discriminatory rate, rebate, or other special concession is made or given to any consumer or user by the municipality or other political subdivision or cooperative organization: *And provided further,* That as to any surplus power not so sold as above provided to States, counties, municipalities, or other said organizations, before the board shall sell the same to any person or corporation engaged in the distribution and resale of electricity for profit, it shall require said person or corporation to agree that any resale of such electric power by said person or corporation shall be made to the ultimate consumer of such electric power at prices that shall not exceed a schedule fixed by the board from time to time as reasonable, just, and fair; and in case of any such sale, if an amount is charged the ultimate consumer which is in excess of the price so deemed to be just, reasonable, and fair by the board, the contract for such sale between the board and such distributor of electricity shall be voidable at the election of the board: *And provided further,* That the board is hereby authorized to enter into contracts with other power systems for the mutual exchange of unused excess power upon suitable terms, for the conservation of stored water, and as an emergency or breakdown relief.

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SEC. 14. The board shall make a thorough investigation as to the present value of Dam Numbered 2, and the steam plants at nitrate plant numbered

1, and nitrate plant numbered 2, and as to the cost of Cove Creek Dam, for the purpose of ascertaining how much of the value or the cost of said properties shall be allocated and charged up to (1) flood control, (2) navigation, (3) fertilizer, (4) national defense, and (5) the development of power. The findings thus made by the board, when approved by the President of the United States, shall be final, and such findings shall thereafter be used in all allocation of value for the purpose of keeping the book value of said properties. In like manner, the cost and book value of any dams, steam plants, or other similar improvements hereafter constructed and turned over to said board for the purpose of control and management shall be ascertained and allocated.

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SEC. 26. The net proceeds derived by the board from the sale of power and any of the products manufactured by the corporation, after deducting the cost of operation, maintenance, depreciation, amortization, and an amount deemed by the board as necessary to withhold as operating capital, or devoted by the board to new construction, shall be paid into the Treasury of the United States at the end of each calendar year.

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SEC. 31. This Act shall be liberally construed to carry out the purposes of Congress to provide for the disposition of and make needful rules and regulations respecting Government properties entrusted to the Authority, provide for the national defense, improve navigation, control destructive floods, and promote interstate commerce and the general welfare * * *. (Added by Act of Aug. 31, 1935.)

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